U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF N-A-

DATE: AUG. 22, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an aerospace engineer, seeks classification as a member of the professions holding an advanced degree. *See* section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). He also seeks a national interest waiver of the job offer requirement that is normally attached to this EB-2 immigrant classification. *See* section 203(b)(2)(B)(i) of the Act, 8 U.S.C. § 1153(b)(2)(B)(i). U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary waiver of the required job offer, and thus of a labor certification, when it is in the national interest to do so.

The Director, Texas Service Center, denied the petition. He found that the Petitioner did not establish that a waiver of the job offer requirement is in the national interest.

The matter is now before us on appeal. In his appeal, the Petitioner submits a brief and copies of evidence already in the record. He states that the Director erred by not issuing a request for evidence (RFE) before denying the petition. The Petitioner further argues that the Director should either lower the advanced degree requirement for the classification or approve the petition based upon his relationship to a U.S. citizen.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

To establish eligibility for a national interest waiver, a petitioner must first demonstrate his or her qualification for the underlying visa classification, as either an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Because this classification normally requires that the individual's services be sought by a U.S. employer, a separate showing is required to confirm that a waiver of the job offer requirement is in the national interest.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –

> (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
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> (B) Waiver of Job Offer –
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> (i) Subject to clause (ii), the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.[1]

The regulation at 8 C.F.R. § 204.5(k)(2) defines an "advanced degree" as:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states that a petition for an advanced degree professional must be accompanied by:

> (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
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> (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

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[1] Pursuant to section 1517 of the Homeland Security Act of 2002 ("HSA"), Pub. L. No. 107-296, 116 Stat. 2135, 2311 (codified at 6 U.S.C. § 557 (2012)), any reference to the Attorney General in a provision of the Act describing functions that were transferred from the Attorney General or other Department of Justice official to the Department of Homeland Security by the HSA "shall be deemed to refer to the Secretary" of Homeland Security. *See also* 6 U.S.C. § 542 note (2012); 8 U.S.C. § 1551 note (2012).

II. ANALYSIS

On appeal, the Petitioner argues that the Director 1) should have issued an RFE before denying the petition and 2) should either lower the advanced degree requirement for the classification or approve the petition based upon his relationship to a U.S. citizen.

The Petitioner's argument regarding the RFE is not persuasive. The Director issued a request on August 5, 2014, specifically asking for documentation of the Petitioner's advanced degree and evidence that a waiver of the job offer requirement is in the national interest. The Petitioner responded on September 26, 2014, and his counsel responded on October 27, 2014.

Regarding the second issue, the Petitioner, who holds a Bachelor of Engineering in Aerospace Manufacturing Engineering from the argues for the first time on appeal that the minimum requirement for the classification should not be an advanced degree, but rather "a secondary school certificate." He does not, however, cite any statutory or regulatory provision which would allow us to waive the classification requirements. As the Petitioner has not established that he held an advanced degree as of the date of filing, the petition cannot be approved.[2]

As for the Petitioner's request that his petition be approved based on his relationship to a U.S. citizen, a post-adjudication alteration of the requested visa classification constitutes a material change. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). In addition, the Ninth Circuit has determined that once USCIS concludes that an alien is not eligible for the specifically requested classification, the agency is not required to consider, *sua sponte*, whether the alien is eligible for an alternate classification. *Brazil Quality Stones, Inc., v. Chertoff*, Slip Copy, 286 Fed. Appx. 963 (9th Cir. July 10, 2008). Furthermore, USCIS is statutorily prohibited from providing a petitioner with multiple adjudications for a single petition with a single fee. The initial filing fee for the Form I-140, Immigrant Petition for Alien Worker, covered the cost of the Director's adjudication of that petition. Pursuant to section 286(m) of the Act, 8 U.S.C. § 1356, USCIS is required to recover the full cost of adjudication. In addition to the statutory requirement, Office of Management and Budget (OMB) Circular A-25 requires that USCIS recover all direct and indirect costs of providing a good, resource, or service.[3] The Petitioner has not cited any statute, regulation, or standing precedent that permits a change to the requested classification once a decision has been rendered by the Director.

III. CONCLUSION

Had the Petitioner established his qualification for the underlying visa classification, the next step would be a determination as to whether a waiver of the job offer requirement is in the national interest.

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[2] The Petitioner does not indicate, and the record does not establish, that he is an individual of exceptional ability.

[3] *See* Circular No. A-25 Revised, http://www.whitehouse.gov/omb/circulars/a025/a025.html (last visited August 15, 2016).

Although we need not provide such a determination, a review of the record in the aggregate supports the Director's findings on this issue.

The appeal will be dismissed for the above stated reasons. In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of N-A-*, ID# 17696 (AAO Aug. 22, 2016)